JD(NY)-19-16
San Juan, PR

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NEW YORK BRANCH OFFICE
DIVISION OF JUDGES

MCALLISTER TOWING AND
TRANSPORTATION CO., INC.

Case No. 12–CA–146711

and

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES & PILOTS,
INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, AFL–CIO

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for the General Counsel.
Gabriel A. Terrasa, Esq. of Columbia, MD.,
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for the Charging Party.
Raquel M. Dulzaides, Esq. and
Diego Ramirez-Bigott, Esq. of San Juan, Puerto Rico,
(Jiménez, Graffam & Lausell),
for the Respondent.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried on October 27, December 14 and 15, 2015 in San Juan, Puerto Rico[1] pursuant to an amended complaint and notice of hearing issued by the Regional Director for Region 12 of the National Labor Relations Board (NLRB or Board) on October 27, 2015 (GC Exh. 1).[2] The amended complaint, based upon charges filed by the International Organization of Masters, Mates & Pilots (Union), alleges that McAllister Towing and Transportation Co., Inc. of the Puerto Rico Branch (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (NLRA or Act) when the Respondent reduced the performance evaluation of José M. Colón and issued him a written disciplinary warning.

It is further alleged that the Respondent unreasonably delayed in providing information requested by the Union in regard to the written warning which was relevant and necessary to the Union's performance as the employee's representative in violation of Section 8(a)(5) and (1) of the Act (GC Exh. 1c). The Respondent timely provided an answer denying the allegations in the amended complaint (GC Exh.1e).

On the entire record, including my credibility assessment and observation of the

[1] All dates are in 2014 unless otherwise indicated.

[2] Transcript testimony is noted as "Tr." The exhibits for the General Counsel are identified as "GC Exh."; Respondent's exhibits are identified as "R. Exh."; and joint exhibits are identified as "Jt. Exh." The posthearing briefs are identified as "GC Br." for the General Counsel and "R. Br." for the Respondent.

demeanor of the witnesses[3], and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND UNION STATUS

An at all material time, the Respondent, incorporated under the laws of the state of Delaware and with an office and place of business located in San Juan, Puerto Rico, has been engaged in ship docking, general harbor towing, coastal towing and bulk transportation throughout the Caribbean. During the past 12 months, the Respondent had gross annual revenues from services performed in excess of $50,000 for the transportation of freight in interstate commerce with various common carriers, each of which operates between the Commonwealth of Puerto Rico and states of the United States. As such, I find and it is admitted, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act (GC Exhs. 9 and 10).[4]

I also find that at all times material, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

a. Collyer Deferral to Grievance Arbitration

The Respondent asserts an affirmative defense in its answer and closing brief that the allegations in this complaint should be deferred to the arbitration process because the issues between the parties extend only to a matter of contract interpretation (R. Br. at 25–28).[5] I shall address this issue before discussing the merits of the complaint.

Under *Collyer Insulated Wire*, 192 NLRB 837, 842 (1971), deferral is appropriate in circumstances when the parties have an unusually long established and successful bargaining relationship; they have a dispute involving substantive contract interpretation almost classical in its form, each party asserting a reasonable claim in good faith in a situation wholly devoid of unlawful conduct or aggravated circumstances of any kind; they have a clearly defined grievance arbitration procedure for resolving their dispute; and, significantly, the Respondent, the party which in fact desires to abide by the terms of its contract, is the same party which,

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[3] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

[4] At the hearing, the Respondent reasserted its position in its answer (GC Exh. 10) that the charge prepared by the Region was improper because it was served upon the wrong address. After due consideration, I determined that service of the charge to the wrong address was harmless error inasmuch as the Respondent responded to the charge, submitted evidence to defend itself and participated in the Region's investigation of the charge. As such, the Respondent was not harmed by the improper service (Tr. 7–9). Service was effectuated because Respondent had knowledge of the proceedings and an opportunity to be heard. *NLRB v. O'Keefe & Merritt Mfg. Co.*, 178 F.2d 445, 447 (9th Cir. 1949).

[5] It was in my discretion to proceed with the unfair labor practice hearing and the parties could fully brief the deferral issue with the merits of the complaint. The counsel for the General Counsel did not address the *Collyer* affirmative defense in his closing brief.

although it firmly believed in good faith in its right under the contract to take the action it did take, offered to discuss the entire matter with the Union prior to taking such action.

More recently, the Board reiterated the following list of its criteria used to assess the competing policy interests and arrive at a decision. The Board considers six factors in deciding whether to defer a dispute to arbitration: (1) whether the dispute arose within the confines of a long and productive collective-bargaining relationship; (2) whether there is a claim of employer animosity to the employees' exercise of protected rights; (3) whether the agreement provides for arbitration in a very broad range of disputes; (4) whether the arbitration clause clearly encompasses the dispute at issue; (5) whether the employer asserts its willingness to resort to arbitration for the dispute; and (6) whether the dispute is eminently well-suited to resolution by arbitration. [Citations and internal punctuation omitted.] *San Juan Bautista Medical Center,* 356 NLRB 736, 737 (2011).

I find that deferral is not appropriate in this situation. While the Respondent and Union have a long established and successful bargaining relationship and the agreement provides for a broad range of disputes, I find that this complaint does not involve a contract interpretation dispute. José M. Colón was not disciplined over a collective-bargaining agreement interpretation. The complaint alleges that Colón was disciplined because he engaged in protected concerted and union activities. The underlying issue is whether the Respondent disciplined an employee, Colón, because he asserted a right to be released from work under a collective-bargaining agreement and thereby violated Section 8(a)(1) of the Act. Further, the complaint also alleges that Colón's discipline was because of his union activity as a union delegate and an advocate for unit employees in violation of Section 8(a)(3) of the Act.

The Act explicitly protects employees from on-the-job discrimination because they have engaged in, or have refrained from engaging in, union activities. As such, the Board has held in cases involving alleged violations of sections of the Act other than Section 8(a)(5) that "…we believe that the Board has a statutory duty to hear and to dispose of unfair labor practices and that the Board cannot abdicate or avoid its duty by seeking to cede its jurisdiction to private tribunals." As the Board repeatedly pointed out, Section 10(a) of the Act is explicit that the Board's power to prevent unfair labor practices shall not be deferred. *National Radio Company, Inc*., 198 NLRB 527 (1972); *General American Transportation Corp*., 228 NLRB 808 (1977).

Second, deferral is not appropriate as the complaint alleges violations of Section 8(a)(5) of the Act for failing and refusing to provide information. *Postal Service*, 302 NLRB 767 (1991); *DaimlerChrysler*, *Corp.*, 344 NLRB 1324 fn. 1 (2005). The Board held in *DaimlerChrysler Corp.* that "under the Board's decision in Postal Service, (citation omitted), the 8(a)(5) complaint allegations concerning failure to provide requested information are not appropriate for deferral pursuant to *Collyer*. Id. at fn. 1. The failure to timely provide information requested by the Union in violation of Section 8(a)(5) and (1) of the Act is not appropriate for deferral to arbitration. Pursuant to *Collyer*, above, the Board has consistently refused to defer such information disputes to arbitration. See, e.g., *Shaw's Supermarkets*, *Inc.,* 339 NLRB 871, 871(2003).

Thus the information request allegations are not deferrable. Even if the other allegations in this complaint could be deferred, the Board does not favor piece-meal deferral and prefers to have an entire dispute resolved in a single proceeding. *DaimlerChrysler Corp*., above.

b. The Discipline of José M. Colón

The counsel for the General Counsel states that José M. Colón, the captain of the tugboat "Brooklyn," made a request to leave his boat that was harbored at pier on November 22

at a time when there were no job assignments and that his request was made pursuant to the terms of a collective-bargaining agreement between the Union and the Respondent and with the Respondent's own past practice. The counsel for the General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) of the Act when it reduced Colón's performance evaluation on December 3 and subsequently disciplined him with a written warning on December 9 because he requested leave of his vessel and to discourage employees from engaging in this or other concerted activities.

The Respondent is a towing and transportation company that provides towing and docking services in the United States and Puerto Rico. The Respondent provides services to its customers 24 hours a day, 7 days a week (Tr. 395). It operates three tugboats in the Puerto Rico area, namely, the "Brooklyn", "Beth" and the "Janet McAllister." The president of the company is Mike Ring. The Respondent's San Juan harbor facility was and is run by the Vice President and General Manager, Jaime Santiago, and under him is the marine superintendent, Captain Félix Feliciano. The managers at the San Juan site work Monday through Friday from 8 a.m. to 5 p.m. After 5 p.m. and during the weekends, the dispatchers are the representatives of management.

Dispatchers are responsible for supervising, directing and coordinating operations between the service needs of customers for tugboat services and the tugboat crew, including the captains. The dispatchers work 8-hour shifts during the week and 12-hour shifts on weekends. The dispatchers are responsible for coordinating the work schedules of the captains and crew to ensure that appropriate and equality in the rest periods and days off as mandated by local and federal safety regulations and the collective-bargaining agreement are in place.

The dispatchers utilize a logbook to record the relevant events that occurred during their work shift. In addition to a logbook, the dispatchers also prepare a "crew work hours record" showing a crew's activity during a 24-hour work shift from 0000 to 2400 hour period (R. Exh. 16, 17; Jt. Exhs. 17 and 18). This document records all the hours worked and rest periods taken by the captain and his crew during their 24-hour work shift.

At all material times, the Union has been recognized as the exclusive collective-bargaining representative of a unit of employee consisting of all licensed personnel employed on all vessels owned, operated, or chartered by Respondent and its subsidiaries, in Puerto Rico operations, excluding all other employees, guards, and supervisors. This recognition has been embodied in a collective-bargaining agreement in effect from April 1, 2013, to March 31, 2016 (Jt. Exh. 1). Section 10 (Days and Hours of Work) of the collective-bargaining agreement provides for the guidelines used by the dispatchers in coordinating the schedules of the tugboat captains and crew and states in part:

> A. Harbor Vessels:
>
> There shall be not less than two (2) fully crewed boats for the duration of this Agreement, provided such operations, in the opinion of the Company, are commercially viable. Tugs shall be available and ready for service as tug services are dispatched during each relevant 24-hour period in accordance with the guidelines provided herein. Boats shall be crewed in schedules of either four (4) days on / four (4) days off, or four (4) days on / two (2) days off rotations. All crews described above (each consisting of one (1) captain, one (1) engineer, one (1) deckhand), shall be assigned in accordance with seniority. The Company shall employ a minimum of twelve (12) crew members to

man the crews described above, when in the opinion of the Company it is commercially viable to do so.

The Company shall make its commercially reasonable best effort to insure that equitable work assignments are distributed among full time crews. The Company at its sole discretion may release crewmembers from their vessels when job assignments are not pending and establish off duty periods which will not be considered working time. The parties agree that the above provisions shall be subject to modification and that scheduling may vary. The Company shall make an effort to procure that crewmembers enjoy at least eight (8) hours of uninterrupted rest at home every day.

The contract states that management will make an honest effort to provide home rest of 8 hours on a daily basis to the captain and crew and if there is no work pending, the company may send a crew member to rest and not be counted as working time (Jt. Exh. 1).

José M. Colón (Colón) has been a tugboat captain with the Respondent since June 1994. He is responsible for the entire crew, enforcing company policies, personnel training and safety (Tr. 23, 24). Colón works a shift consisting of four consecutive work days and 2 days off. During his 4 workdays, Colón, like all tugboat captains, is on call and is required to work even if he is resting at home or at the pier. Colón is also a member of the International Organization of Masters, Mates, and Pilots and a shop steward for the Union. As a steward, he is responsible for grievances, disputes over the collective-bargaining agreement and with labor negotiations with the Respondent. Colón testified that there are weekly complaints by the crew over the equality in the distribution of the resting periods by management (Tr. 24–30).

Colón testified that there are two company memoranda that help to clarify Section 10 of the collective-bargaining agreement regarding employee work schedules. Section 10 allows for the employee to rest at home during their work shift pending any work assignments. The first memorandum states that a phone number must be provided by the employee while the employee is resting at home during a work shift (GC Exh. 3).[6] The second memorandum states that any personnel may leave the company's premises at his or her own risk when no work duties have been assigned (GC Exh. 4). Colón stated that the second memorandum allows employees, including the captain, to leave the tugboat while the boat is "resting" (or harbored) at the pier and when there are no work duties assigned (Tr. 31).

It is not in dispute that during a 24-hour work shift, the captain may be resting at home or he may be on his tugboat resting at the pier. If a captain decides to leave the boat while resting at the pier, he must inform the dispatcher that he is leaving. The dispatcher must have this information in order to contact the captain in case of an emergency or an unscheduled work assignment. Under such circumstances, the captain is allowed to leave the boat under his own risk. While resting at the pier, the crew is being paid even if not working.

The Incident of November 22, 2014

On November 22, Colón was on his fourth day of his 4-day work shift. His rotation started on November 19 at 12 a.m. and ends at 12 midnight on November 22 (Jt. Exh. 17).

[6] Employees are not required to work and not required to answer a call from the dispatcher and may decline a work assignment if contacted during their days off (Tr. 325).

Colón testified that his tugboat was resting at the pier after finishing a work assignment. At around 4 p.m., Colón communicated to the dispatcher, Moisés Ramos Rodriguez (Ramos), by radio and asked if Ramos was going to grant him and his crew an 8-hour-rest-at-home period. Ramos replied in the negative because another captain (Captain Enrique Sánchez) and his crew were already taking their 8-hour rest period and presumably Colón's crew may still be needed for another work assignment before ending the workday.

Colón called Ramos several minutes later, but this time by telephone and asked for permission for only him to leave the ship (Tr. 34, 35). Colón was instructed by Ramos to remain on the boat. Colón told Ramos that the collective-bargaining agreement allows him to leave the employer's premises under his own risk and that he was leaving. However, Colón decided to stay on the ship. Colón testified that he attempted to contact the Marine Superintendent, Félix Feliciano (Feliciano), to inform him of the situation. He was unable to reach Feliciano on his first and second calls. Colón said that Feliciano returned his call. Feliciano, after having been informed by Colón of his conversations with Ramos, told Colón that he will relieve him with another captain (Harry Martinez) and to wait until he arrives to cover the ship and then Colón may leave. Colón replied that was fine. Colón testified that Captain Martinez never arrived to relieve him (Tr. 35–46).

Colón followed his conversation with Feliciano within approximately 10 minutes with a text to him thanking him for his intervention with Ramos regarding his request for home rest. In regard to the text that Colón sent to Feliciano on November 22, the text was not preserved by Colón but a transcription of the text was saved by Feliciano and translated from Spanish to English in the body of an email that Feliciano sent to Jaime Santiago.[7] Colón testified that essentially the email version of the text was correct. Colón sent the text thanking Feliciano for intervening on his behalf with Ramos and stated that Colón will accept the consequences when Ramos attempted and could not reach him (Tr. 38–45; R. Exh. 20).[8]

Captain Martinez never arrived to relieve Colón. Colón and his crew left the vessel at 10 p.m. after being released by Ramos. That was also the last day of their 24-hour work shift. Colón said he was never granted his 8-hour rest period (Tr. 47).

Moisés Ramos Rodriguez (Ramos) testified that he is employed as the safety security coordinator for the Respondent. He is the custodian of all safety records, maintains the safety equipment used by the ship crew and conducts safety drills. Ramos previously worked as a dispatcher for 6 years before being promoted to the safety coordinator. He continues to work as a dispatcher on weekends or to cover the vacations of others. Ramos routinely works a 12-hour shift on weekends.

As a dispatcher, Ramos receives calls from the customers to coordinate the services and communicates with the captains the needs of the customers, such as towing the ships. He also informs the captains when to leave port for service calls, their hours of work and schedules.

[7] The translation of the text was discussed at the trial and the English version was accepted as accurate (Tr. 338–344).

[8] This part of his text referred to Ramos' attempt to reach Colón by ship radio at approximately 1:10 p.m. on November 22 to have him turn on his tugboat engines. Ramos wrote in the logbook that Colón never answered the radio. Colón testified that he did not hear the radio call but when he heard the engines of the second tugboat starting, Colón radioed Ramos if he should start his engines (Tr. 57; R. Exh. 16, line 1310).

On weekends and after hours, Ramos, as the dispatcher, supervises the captains (Tr. 197–201). Ramos said that dispatchers communicate with captains by phone and VHF 79 radios. There are three radios used to communicate with the captains. There is one work area for the dispatchers (Tr. 206–209).

Ramos testified that there is a dispatcher logbook for a 24-hour period and that he records "everything down" during his 12-hour shift. He explained that the dispatcher on 12–8 a.m. shift writes everything down and the same procedure continues with the dispatcher from the 8–4 p.m. shift. Ramos referenced the logbook for November 22 (Saturday) and noted that the log started at 12 a.m. and ended at 11:35 p.m. Ramos started his 12-hour shift from 12 noon and he worked until midnight (Tr. 210–212; R. Exh. 16: Dispatcher logbook during the 24-hour period on November 22).

Ramos testified that Javier González (González) was the dispatcher when Ramos took over the shift at 12 noon. As a practice, Ramos would ask the previous dispatcher the number of requested services by customers, which boat was resting at the pier, which employees were resting at home, and who was next to rest at home. Ramos wanted to make sure that the captain and crew receives the appropriate 8 hours rest period at home. González informed Ramos that Colón arrived at 9 a.m. from his rest at home and that Captain Sánchez was resting at pier. Ramos was informed by González that Sánchez was previously resting at home and his rest was interrupted for a customer service. González told Ramos that Sánchez would continue to rest at home after he finished the service and that Colón would stay and rest at the pier in case of any service calls (Tr. 214, 215).

Ramos attempted to reach Colón at 1310 hour (1:10 pm) on November 22 but received no response. Ramos wrote down on the logbook that: "Capt. Colón never answer instruction on 79 (radio). Capt. answer on 79 after a couple of minutes" (R. Exh. 16). During the hearing, Ramos testified that Colón returned his call after 7–10 minutes (Tr. 215–217).

At 4 p.m. (according to the logbook at R. Exh. 16), Colón called Ramos by telephone. He asked for the course of action for him and his crew. Ramos responded that Colón should rest at the pier because Captain Sánchez needed a new rest period. Consistent with Colón's testimony, Ramos stated that resting at the pier means that the tugboat is moored at the pier and that the crew is not working but getting paid. Ramos stated that the crew can do what they want and could leave the ship under "their own responsibilities." Ramos said that an employee could leave at his/her own risk and would be responsible and may be discipline if the employee cannot be reached while away from the boat. Ramos stated that the crew needs to be in contact with captain or engineer when they leave the boat because they may be required to return if there is work. Ramos testified that a captain must report to the dispatcher if he wants to leave the boat. Disciplinary action may be taken if the captain is not available and there is a need for a service from a client (Tr. 217–220; 261–263).

Ramos further testified that he received a second call by telephone from Colón approximately 30–35 minutes later. Ramos said that Colón made the same inquiry as to what course of action will be taken for his crew. Ramos gave the same instructions to Colón to rest at the pier. Ramos was aware that Colón had already worked 4 consecutive 24-hour days by November 22 but he wanted to double check with dispatcher González regarding Colón's work schedule because Colón was requesting to be released from work and only Captain Sánchez was entitled to rest at home (Tr. 220–222).

Ramos testified that he was talking to González on the phone with his left hand when he answered a third call from Colón by radio with his right hand. Ramos testified that Colón called him at the same time that he had called to Gonzalez. He said that Colón made his radio call at approximately 3:50 p.m. Ramos said that Colón asked "What are you going to do with us, are you going to send us to rest at home." Ramos again instructed Colón to "rest at the pier" (Tr. 222–225, 229).

When Colón asked the same question a second time during the call and received the same response, Colón replied to Ramos that he was leaving. Ramos informed Colón that he leaves at his own risk and Ramos will write in the logbook that Colón was leaving. Ramos felt that Colón then "exploded" with strong words and a strong tone of voice that Ramos perceived as being disrespectful. Ramos said that Colón told him that Ramos is free to call his bosses.

Ramos said that Colón used "strong words," but they were not curse words, just disrespectful and very rude. Ramos testified that Colón said "he told me log the Bible, call Mike Ring, call Buckley, call Jaime Santiago, Felix. I am leaving" (Tr. 231). Since Ramos was still on the phone with González, he asked González whether he heard Colón talking. González allegedly replied that "he (Colón) used very strong words. Strong words. Log it because he was disrespectful to you. He used very strong words" (Tr. 224–231; 246–247).

Ramos' entry in the logbook (R. Exh. 16) for 1600 (4 p.m.) on November 22 states,

> At this time Capt. Colón asked what was the next service after the M/T Gotland Marienn (ship that was serviced) which I reported none and also he asked if I was going to let them go cause today is their last day. I told him that they were resting at pier cause Capt. Sánchez crew was the one to take the break as dispatcher J. González informed me. Capt. Colón said that he will be leaving and I told him under his own risk and that it will be log. Due to (the fact) that Capt. Martinez is not on the dock left under his own risk as always and Capt. Sánchez is on his resting period. As I inform this to Capt. Colón, he said via channel 79 that I could write, call Mike Ring and the entire company (bad attitude)!!! While this conversation was going on I was talking via cel (sic) with J. González that heard Capt. Colón was making such comments.

Ramos testified that he subsequently received a call from Superintendent Félix Feliciano. Feliciano tells Ramos that Colón had called him and asked Ramos to explain what had occurred. Ramos explained what had happened and also informed Feliciano that Colón was rude to him. Feliciano allegedly told Ramos to "take it easy" and he "will see what he can do." Ramos said that Feliciano called back after speaking to Colón (Tr. 232, 233). Ramos said that Feliciano told him that he spoke to Colón and proposed that Colón could leave the boat but his crew had to remain. Colón responded that he would not leave without the crew. Feliciano proposed a second solution to allow Colón and his crew to leave since it was towards the end of their shift anyway and that Captain Sánchez could return with a reduced rest time (Tr. 233).

Two days later, Ramos prepared a summary of the November 22 incident. Ramos said that McAllister president, Mike Ring, instructed him to prepare the summary report. Ramos surmised that Vice-President Jaime Santiago had informed Ring about the incident. Ramos said he gave his report to Santiago (Tr. 234–236). Ramos' summary, in part, states that Colón called him at 4 p.m. on November 22 after servicing a ship and asked if the dispatcher was going to release him home. Colón was informed that he should be resting at pier because the rest period was for Sánchez and crew. The report stated that Colón called a second time and asked the same question. Ramos replied with the same answer that Colón must rest at pier.

The report stated that Colón replied "Ok." Ramos stated that he believed that since Colón and his crew were on their last day of work, they were looking to leave early. The report stated that Colón called a third time "later on" by radio and Colón asked the same question. Ramos stated that he had called González on the phone to do a double check on Colón's work schedule and to confirm the instructions given to him by González regarding the captains' schedules. The report stated that after a few minutes, Colón informed Ramos that he was leaving. Ramos responded that he will leave "under his own risk and it will be logged on the dispatcher log book." The report stated that "Capt. Colón the(n) proceed to answer me with a challenging tone and attitude saying that I could log the entire Bible, call Mike Ring, call Buckley and the entire company that he was leaving." The report further stated that González overheard "such challenging comments" made by Colón. Ramos stated in his report that after a few minutes, he received a call from Félix Feliciano and he inquired as to the situation. The report stated that Feliciano told Ramos to relax because he sound upset and that Feliciano will handle the situation (R. Exh. 17).

Javier González Diaz (González) testified that he has been a dispatcher for 18 years. González explained that resting at pier allows crew members to leave the boat so long as the dispatcher is aware of their departure. González said he received a call approximately 4 p.m. at home from Ramos regarding Colón's rest period. González confirmed to Ramos that Colón rested at home for 9 hours before starting work again (Tr. 274–283). González said that he overheard Colón talking on the radio "very clearly because it was loud" that Colón was telling Ramos that "he was leaving , to write it on the Bible, call Mike Green, Brian McAllister, to write whatever he wanted, he was leaving" (Tr. 288). González told Ramos to write in the logbook as to what was said by Colón (Tr. 289). González said that he subsequently contacted Felix Feliciano and told him that Colón was disrespectful to Ramos and sounded angry and upset. González said that Colón has a work history of not communicating with the dispatcher but admitted he is only aware of this incident with Ramos when Colón was disrespectful to another employee (Tr. 289–291).

Félix Feliciano (Feliciano) is the marine superintendent and supervises the tugboat captains and the crew. He also supervises the dispatchers. Feliciano testified to his understanding of "resting at the pier" and his understanding was consistent with prior testimony that the captain and crew could do what they wish while resting at pier so long as the dispatcher is aware when a crew member is leaving the boat so s/he could be contacted to return and perform a service. Feliciano explained that a captain may be subjected to discipline if he is not available and a service is lost. Feliciano also indicated that even when a call is not timely answered by the captains, this imposes an operational problem with the dispatcher who is responsible for coordinating the work of the tugboats and the clients' ships (Tr. 320–331).

Feliciano testified that he received a call from Colón at approximately 4 p.m. Feliciano recalled that Colón was using curse words when referring to dispatcher Ramos and felt that Colón was "someone who had lost control" (Tr. 333). Feliciano said that Colón told him that he was leaving the boat and Feliciano told Colón to control himself and explain what had occurred. Feliciano told Colón that he will speak to the dispatcher and compare both versions of the situation and will get back to Colón. Feliciano contacted Ramos and felt that Ramos was nervous and was upset with Colón. After speaking to Ramos, Feliciano did not believe that Colón had a valid reason to take a rest but nevertheless, in order to resolve the situation, Feliciano called Colón and told him that he could leave and Captain Martinez will cover for him. However, the crew had to remain resting at pier. Colón insisted that his crew should also be released. Feliciano replied that it was Colón's decision if he wanted to leave without his crew. Feliciano then called Ramos a second time and informed him that Colón declined the offer to

leave. Feliciano instructed Ramos to contact another crew and have them ready to work at 9 p.m. and that Colón's crew could be released at that time (Tr. 333–336; 367–369).

Feliciano testified that Colón referred to Ramos and the other dispatchers as "mother fuckers" and a "bunch of shits" during his conversation on November 22 (Tr. 336, 337).

Feliciano also testified to a text that Colón subsequently sent to him after their conversation (R. Exh. 18). Colón's text, as noted above, was in the form of an email that was sent by Feliciano to Santiago on November 24. The text was from Colón's cellphone to Feliciano and was in Spanish. The text was then transcribed in English in the email from Feliciano to Santiago. The accuracy of the language translation is not disputed by the parties. In the text, Colón criticized the dispatchers about their attitude towards the captains and that they "don't give a shit." The text also criticized the other captains who do not care what happens when they damage the lines, the boats or lose services. Colón said that under the same situation but with a different captain, the dispatcher would have released the crew. Finally, Colón stated in his text that

> Don't worry about holding any meeting I appreciate it and if you want to talk officially about what happened with the radio no problem I already told you what happened and I accept the consequence that it won't happen again believe me unless its because of damage to a boat.

Feliciano testified that the last sentence in the text was Colón's willingness to accept the consequences of his actions in talking to Ramos in a strong manner (Tr. 343–346; 375).

Colón's Performance Evaluation and Written Warning

On December 3 at approximately 3:30 p.m., Colón met Feliciano in his office. Colón was told by Feliciano that the professional ethics portion of his performance evaluation for 2014 was being reduced from four to two points because of what had occurred on November 22. The evaluation was prepared at the beginning of November and before the November 22 incident. Feliciano said that the final evaluation was being amended and that he was reducing the professional ethics portion by two points. Under the performance element of "Leadership," Colón was given a rating of "2" (Below Expectations") in "Ethics" ("ability to conform and promote the company's standards of conduct. Maintains a high level of character and a professional attitude") by Feliciano (Tr. 53–55; GC Exh. 5). Colón was rated a four out of a maximum of five points in Ethics in his previous evaluation (GC Exh. 6).

At the December 3 meeting, Colón denied shouting at Ramos. He also denied insulting him or making threats against him. Colón explained that there have been constant differences with him and the dispatchers over his entitlement to rest at home period; his work logistics; in the equal distribution of work; and over his maximum hours of work. He stated that Feliciano is often needed to resolve the disputes between him and the dispatchers (Tr. 47–49).

Colón denied that he told Ramos that he could "write it down on the Bible" (Tr. 93). Colón also denied in conversation with Feliciano that Ramos and other dispatchers were "motherfuckers" (Tr. 103).

Subsequently, on December 9, Colón was issued a written warning by Jaime Santiago (GC Exh. 7). The written warning[9] stated

> On November 24, 2014 when the Dispatcher ordered you to rest at the pier with your crew, you challenged him and refused to follow his instructions threatening to leave your work post. It has come to our attention that it is not the first time that you show a total lack of respect towards the Dispatchers. We must remind you that the Dispatchers are the representatives of management after 5:00 p.m. and during the weekends.
>
> Moreover, you must also answer the telephone and/or the radio when the Dispatchers call you on a timely manner. As the Master of the tugboat, you are responsible for the safety of the crew and are required to provide a service of excellence to McAllister's clients. When you do not respond to a Dispatcher's call, a service could be lost, thus affecting the operations of the Company.
>
> If you continue to incur in this type of conduct, you will give us no other alternative than to take more severe disciplinary action, that could include termination of employment.

Jaime Santiago (Santiago) testified that he was and is the general manager and vice-president of McAllister Towing since June 2013. Santiago is responsible for managerial administration, sales, and supervision of different departments. He directly supervises Feliciano (Tr. 393–395). Santiago said he issued the warning because Colón was disrespectful to the dispatcher and when Colón spoke to Ramos in a "insolent way and [in] a rude and a loud voice" (Tr. 397). Santiago said that the warning was also because Colón fails to timely "answer neither the phone nor the radio when he was called to perform service" (Tr. 398).[10]

Santiago said he became aware of the November 22 incident after meeting with Feliciano. Santiago conducted an investigation into the incident on November 24 by talking with Feliciano and Ramos. He also corroborated what Colón said to Ramos by interviewing dispatcher González (Tr. 362, 388–399). Santiago did not interview Colón because he felt that Colón had already accepted his responsibility and the consequence of his action in his text to Feliciano after the incident (Tr. 400). Santiago explained that the intent of the warning was to bring Colón's "attention to the situation and let him know that it was not acceptable and something that could not happen again"(Tr. 400).

On December 22, Colón attended a grievance hearing with Feliciano and Santiago. Colón was accompanied by his Union Representative, Eduardo E. Iglesias (Iglesias). The Union was notified of the warning by Santiago in an email to Iglesias (Jt. Exh. 2). The warning memo was attached to the email. Santiago testified that the warning memo attached to the email was in fact the final version and not a draft (Tr. 400, 401). Iglesias testified that he received the email and discussed the matter with Colón. He said that arrangements were made to schedule a meeting with all the individuals (Tr. 155).

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[9] The parties agreed that the date of the incident occurred on November 22 and that warning inadvertently noted an incorrect date.

[10] Feliciano testified that he assisted Santiago in drafting the warning (Tr. 358, 362).

At the December 22 meeting, Santiago told Colón that he was not going to tolerate any disrespect and that the dispatcher had to restrain him and his crew from leaving. Colón replied that he was granted permission to leave the ship once Captain Martinez arrives and that he never left the vessel because Martinez never arrived. With regard to the charge that Colón failed to answer the dispatcher's call, Colón explained that he was at the stern of the ship when Ramos attempted to reach him and was unable to do so. Colón also denied being disrespectful to Ramos (Tr. 58–62). The meeting ended abruptly after a disagreement between Colón and Feliciano as to whether Colón was offered an opportunity to leave by Feliciano. Santiago said he ended the meeting because he believed that tempers were beginning to flare (Tr. 402).

Discussion and Analysis

The counsel for the General Counsel argues that the Respondent violated Section 8(a)(3) and (1) of the Act when Colón was issued a written warning and his performance evaluation was reduced because Colón was engaged in protected concerted activity when he invoked his rights and that of his crew to leave the vessel under the collective-bargaining agreement and pursuant to the Respondent's "leaving at your own risk" policy. The Respondent argues that Colón did not engage in protected concerted activity because Colón was not invoking his rights under Section 10 of the collective-bargaining agreement since he already had his 8 hours of uninterrupted rest at home.

The complaint alleges that Colón's reduced performance evaluation and written warning violated Section 8(3) and (1) of the Act. Section 8(1) of the Act prohibits employer interference, restraint, or coercion of employees for their exercise of the rights guaranteed in Section 7 of the Act. Those rights include "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities of the purpose of collective bargaining or other mutual aid or protection." Section 8(3) prohibits employers from discriminating in regard to an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." An employer violates Section 8(a)(3) by disciplining employees for antiunion motives. *Equitable Resources*, 307 NLRB 730, 731 (1992).

The Respondent Violated Section 8(a)(3) and (1) for Disciplining Colón

This is a concerted activity case. The Board has long described concerted activity "in terms of interaction among employees." See *Meyers I,* 268 NLRB 493, 494 (1984); *Meyers II,* supra, 281 NLRB at 887, quoting *Root-Carlin, Inc.,* 92 NLRB 1313, 1314 (1951). There is no doubt that Colón was engaged in concerted protected and union activity. Section 10 of the collective-bargaining agreement provides that

> The Company shall make its commercially reasonable best effort to insure that equitable work assignments are distributed among full time crews. The Company at its sole discretion may release crewmembers from their vessels when job assignments are not pending and establish off duty periods which will not be considered working time. The parties agree that the above provisions shall be subject to modification and that scheduling may vary. The Company shall make an effort to procure that crewmembers enjoy at least eight (8) hours of uninterrupted rest at home every day.

Section 10 of the collective-bargaining agreement does not reference "resting at pier" but this section has been clarified by a company memorandum ostensibly negotiated with the Union

and a policy that has been in place since 2004. The memorandum states that any personnel may leave the company's premises at his or her own risk when no work duties have been assigned (GC Exh. 4). Colón stated that this memorandum allows employees, including the captain, to leave the tugboat while the boat is "resting" (or harbored) at the pier when there are no work duties assigned. Dispatcher González confirmed that "resting at pier" allows the captain and the crew of a boat to leave the pier so long as they are able to return to the vessel when contracted by the dispatcher for a service call (Tr. 282).

I find that Colón acted in concert when asserting his rights and that of his crew under Section 10 when his vessel was resting at pier and there were no scheduled work assignments at the time he requested leave. On November 22, Colón contacted Ramos and asked if he was going to grant him and his crew the 8-hour rest period pursuant to Section 10 of the collective-bargaining agreement. When informed that another captain was already resting at home, Colón's second inquiry to Ramos was to allow him to leave the boat, which was consistent with Section 10 and the company's memorandum of leaving the vessel while resting at the pier. When Ramos informed Colón that he could leave "at his own risk," Colón contacted Feliciano and was offered the opportunity to leave but that his crew must remain until another captain could be located to replace Colón. Colón refused the offer because he believed his crew was also entitled to the leave and he did not want to go without his crew.

The Respondent argues that Colón was not entitled to receive another 8-hour rest period because he already had 8 hours of uninterrupted rest at home and therefore he was not invoking the collective-bargaining agreement. Colón credibly believed and testified that his 8-hour rest at home on November 22 was for the previous day because he did not receive his 8 hours of rest for November 21 (Tr. 122–124). Colón's reasonable and honest invocation of his rights under Section 10 and the memorandum regardless if he was ultimately incorrect is nevertheless protected concerted activity. *NLRB v. City Disposal Systems*, *Inc.*, 465 U.S. 822 (1984).

The General Counsel also maintains that Colón was disciplined for his union activity. I find it credible that Colón was disciplined for his union activity. Colón testified that the discipline was issued because he has been advising other captains regarding their work schedules and rest periods under the collective-bargaining agreement (Tr. 66). He testified that the captains are constantly complaining about their work schedules and rest periods. Iglesias testified that Colón is an advocate for the Union and has been involved in educating employees as their collective-bargaining agreement. He said that Colón provides advice about the contract and is on the bargaining committee for contract negotiations. Iglesias believes that Colón is being targeted by the Respondent (Tr. 170). Additionally, Feliciano testified he knows that Colón is a Union delegate (Tr. 360).

In my opinion, Colón was asserting the rights of the crew and himself under the collective-bargaining agreement when he inquired as to whether a rest period would be granted by the dispatcher. Although no evidence was presented that Colón had discussed with his crew about leaving the vessel, it is obvious that Colón was advocating on behalf of himself and his crew under the collective-bargaining agreement. The Board has found unlawful discipline imposed on employees for their discussions of common concerns about wages or work schedules even when no specific group action was discussed, because "it is obvious that discussions of this kind usually precede group action." See *St. Margaret Mercy Healthcare Centers,* 350 NLRB 203, 204, 212 (2007) (employee discussions about the effect of a new performance evaluation policy held concerted, despite lack of evidence that employees contemplated group action). Further, in *Talsol Corp.,* 317 NLRB 290, 316–

317 (1995), the Board upheld the judge's findings that an employee's statements at a safety meeting indicating concern with matters which affected not only himself but other employees constituted protected concerted activity. In applying the rule under *Interboro Contractors*, *Inc.*, 157 NLRB 1295 (1966), the Board has held that individual activity involving attempts to enforce the provisions of an existing collective-bargaining agreement is concerted activity.

> Whether or not Colón was correct in his interpretation of the contract or the memorandum is irrelevant. Colón's belief was a reasonable interpretation of the contract. Such activity is concerted regardless of whether the employee's understanding of the contract is correct. *NLRB v. Farmers Bros. Co.*, 988 F. 2d 120 (9th Cir. 1993).

Once having determined that the employee engaged in protected concerted and union activity, the analysis focuses on whether this conduct was the cause of his discipline and if so, whether he in fact committed misconduct in the course of the protected activity warranting the discipline. As 8(a)(3) cases generally turn on the question of employer motivation, the Board and the courts employ a causation test to analyze the merits of such allegations. *Wright Line*, 251 NLRB 1083 (1980), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Sea-Land Service*, *Inc.*, 837 F.2d 1387 (5th Cir. 1988).

> The Board has held that where the conduct for which the employee is disciplined is intertwined with protected concerted activity, the Board's traditional *Wright Line* analysis does not apply. *Rogers Corp.,* 344 NLRB 504, 513 (2005), citing *Felix Industries, Inc.,* 331 NLRB 144, 146 (2000). Rather, the Board applies the test set forth by the Supreme Court in *NLRB v. Bumup & Sims, Inc.,* 379 U.S. 21, 23 (1964). There the Court held
>
> > In sum, Section 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

That is the case here. The Respondent argues that during his conversation with Ramos, Colón talked disrespectfully and in a challenging tone to Ramos as the reason for the warning letter and reduction in his performance evaluation. The Respondent further contends that the warning was given for Colón's failure to timely answer calls from the dispatchers. On the other hand, the General Counsel argues that Colón was singled out for his concerted and union activity.

It is my opinion that the Respondent simply failed to establish that Colón engaged in any substantiated misconduct in his conversations with Ramos or that he failed to timely respond to the calls from dispatchers to justify the reduction in his performance evaluation and in the issuance of the written warning.

I find that Ramos' testimony lack credibility and was inconsistent as to when the calls were made by Colón to Ramos. This is critical because the dispatcher's logbook which should have included the conversations between Colón and Ramos would have provided corroborating evidence to Ramos' testimony. The logbook, unfortunately, is sorely lacking in details. This is significant because much ado had been made by the Respondent during the hearing as to the importance of entering relevant events into the dispatcher's logbook. Ramos testified to four

calls from Colón. However, Ramos' logged only one entry from Colón made at 1600 hours on November 22. Ramos testified that the conversation with Colón in his first call was actually fine and that Ramos did not feel upset. Ramos testified that the second call from Colón occurred 30–35 minutes later, but he was too upset to note the call or what was said in the second call. Ramos stated that Colón was not "very clear" in his statements to Ramos. Ramos testified to a third call by Colón that was made 15–20 minutes later. However, Ramos also testified that the third call was at 3:50 p.m., 10 minutes prior to the first call made by Colón at 1600 hours (4 p.m.) (Tr. 229). Ramos then indicated that the third call was actually made 30 minutes later. Ramos testified that Colón "exploded" in the third call, but there was no entry in the logbook as to what Colón said or what was said to him. Ramos also testified to a fourth call approximately 40 minutes later from Colón, but no details or entry on the logbook reflected this call (Tr. 247–254). So instead of one entry in the logbook at 1400 hour, there should have been at least four entries over a 90-minute period before and after 1400 hour.

Regarding the performance evaluation, Feliciano never stated the reasons for reducing the points given to Colón. The performance evaluation did not include any supervisor's comments to justify a "below expectations" performance rating for Ethics (GC Exh. 5). Professional Ethics in the performance evaluation is defined as the "ability to conform and promote the company's standards of conduct" and an employee "Maintains a high level of character and a professional attitude." At the hearing, Feliciano was not examined by the counsel for Respondent as to what the company's standards of conduct were and how Colón failed to maintain a high level of character and professional attitude. At most, the attitude and character attributed to Colón as described by Feliciano and Santiago was his use of a challenging tone to Ramos and a lack of respect towards him.

Regarding the warning letter of December 9, it stated that Colón showed "a total lack of respect" towards Ramos (GC Exh. 7). However, the warning did not describe the conduct that demonstrated Colón's lack of respect to the dispatchers. Santiago testified that Colón was insolent (Tr. 410) but that was not reflected in the warning letter. The warning letter simply does not describe Colón's alleged misconduct. The testimony by Ramos does not substantiate misconduct on the part of Colón. Ramos testified that Colón "exploded" but did not detail what was said. Dispatcher González, who had overheard the third conversation between Ramos and Colón, did not hear any cursing or use of swear words used by Colón. Feliciano testified that Colón referred to the dispatchers as "a bunch of shits" and "motherfuckers." However, Colón was not charged with using curse words either to the dispatchers or to Feliciano as a reason for the warning letter and in the reduction of his performance evaluation. Indeed, there is no mention of Colón using curse words at all.[11] Santiago testified that Colón's text message to Feliciano showed that he accepted the consequence of his action. However, it would not make sense for Colón to vigorously fight his discipline if it was to be believed he was willing to accept the consequences of his action. Rather, I credit Colón's testimony that his acceptance of fault was in reference to Ramos' attempt to reach him by ship radio at 1:10 p.m. on November 22 to turn on his tugboat engines and not for his interaction with Ramos at 4 p.m. (Tr. 45).

Even assuming Colón was not fully credible on this point, Santiago testified that the second paragraph in the warning regarding to Colón's failure to timely answer the dispatcher's calls was actually not in reference to the events on November 22. Rather, Santiago said that

[11] The Respondent does not allege, and I do not find, that Colón was disciplined because he had engaged in opprobrious conduct costing him the Act's protection. *Atlantic Steel Co.*, 245 NLRB 814 (1979).

the second paragraph only related to problems of communications with Colón in the past and not for November 22 (Tr. 410, 411). Colón's last discipline for failing to answer a call was in February 2013 (Tr. 378).[12] Colón has not been disciplined after the November 22 incident for failing to respond or communicate with dispatchers (Tr. 65). It behooves me to question the legitimacy of the discipline that was issued, not for a present transgression, but rather, for some vague infractions in the past. The Respondent maintains that Colón was not singled out for disparate treatment and proffered discipline of other captains. To the contrary, a review of his discipline history shows that Colón has been disciplined, perhaps only four times, since becoming a captain in 1994 for failing to timely answer a call. To discipline Colón now with a warning for his infractions in 2013, 2008, and 2007 is to single him out for disparate treatment. In addition, the discipline taken against the other captains did not involve alleged insolent conduct or for failing to timely answer a call from a dispatcher (Tr. 389–391, R. Exhs. 22–29). The discipline taken against the other captains involved insubordination, abandonment of work, tardiness, or refusal to report for work. Only one prior discipline regarding Captain Soto involved a failure to respond to a dispatcher's call and that occurred on April 24, 2007 (R. Exh. 28). Consequently, I find that the discipline taken against Colón was disparate, not similarly situated to the other captains and also lacks the relevant proximity in time to that of Colón's prior disciplines to establish any legitimacy for the written warning and the reduction of his performance evaluation.

Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) when it issued a written warning to Colón on December 9 and lowered his performance evaluation because of his concerted and union activity. *American Medical Response of Connecticut, Inc.,* 359 NLRB No. 144, slip op. at 3–4 (June 28, 2013)(finding that an employee was discharged for his conduct during the course of his protected activity and that employer failed to meet its burden of showing that it held an honest belief that he engaged in misconduct); also *CGLM, Inc.,* 350 NLRB 974, 979–980 (2007)(employer unlawfully discharged employees because it believed that the employees were engaged in a strike, which is protected concerted activity).[13]

[12] The Respondent presented disciplined issued to Colón for his past failures to timely respond to dispatchers' calls and other infractions (R. Exhs. 6–11). Colón's three occasions for failing to answer a call occurred in 2007 and 2008. His other infractions did not involve communication problems.

[13] Assuming that the Wright Line test is applicable in this situation, I find that the General Counsel has shown a prima facie sufficient to support an inference that the employee's protected conduct motivated the employer's adverse action. The General Counsel has established by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 278 (1994); *Wright Line*, above. Because the Respondent's reasons for the discipline have shown not to be worthy of belief, the Respondent has not met its burden of showing the same action would have taken place even in the absence of protected conduct. See *Manno Electric, Inc.,* 321 NLRB 278, 280 fn.12 (1996); *Farmer Bros., Co.,* 303 NLRB 638, 649 (1991). To meet this burden "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984); *Durham School Services, L.P*., 360 NLRB No. 85 (April 25, 2014).

c. The Union's Request for Information

On December 30, the Union provided notice to the Respondent that it was filing a grievance over the written warning and summarized what had occurred at the December 22 meeting. The Union also demanded the removal of the warning letter (Jt. Exh. 9). In a letter dated January 30, 2015, the Respondent responded that the Union's characterization of the December 22 meeting was inaccurate and refused to remove the warning memo (Jt. Exh. 4).

On January 22, 2015, the Union responded to the Respondent and stated that it was continuing its investigation in preparation for a grievance and requested certain information (Jt. Exh. 5). The request sought the following information

(a) As to the "hostile attitude" allegation, please describe with particularity what facts form the basis for that conclusion, specifically, what conduct from Capt. Colon was "hostile." Additionally, please state when the conduct took place, towards what dispatcher it was directed, what were the facts of the incident, and what witnesses (if any) were present.

(b) As to the "failure to answer" allegations, please state what calls (radio or telephone) were made to Capt. Colon that he failed to answer, including who made the call, the date the call was made, the time it was made, and whether it was radio or telephone.

Iglesias testified that the information requested was needed in order "to determine whether the allegations are correct about the warning" and "pertaining to the alleged hostile attitude, the description and particularities of what took place and specifically the words that were said towards the dispatcher and also the allegations of the failure to answer calls" (Tr. 162–164). No response was provided by the Respondent until May 15, 2015 (Tr. 164; Jt. Exh. 7). On June 15, 2015, the Union responded that the information provided by the Respondent was insufficient and requested additional information (Jt. Exh. 8)

Discussion and Analysis

The counsel for the General Counsel argues that the Respondent violated Section 8(a)(5) and (1) of the Act when it unlawfully failed and refused to fully comply with the Union's request for information that was necessary and presumptively relevant in order for the Union to represent Colón in the grievance proceeding and that the Respondent was legally obligated to provide the information in a timely fashion (GC Br. at 35). The Respondent maintains that it had satisfied the information requested by the Union, had made a good-faith effort to provide all the information and that the information request was unduly burdensome, done in bad-faith and to harass the Respondent (See, Respondent's answer to the complaint at GC Exh. 1e).

During the hearing on December 14, 2015, the counsel for the Union stated that the information requested had been provided to the Union. The counsel for the Union agreed that the Union's information request has been satisfied. I proposed that the General Counsel enter into a settlement with the parties on the information request allegations inasmuch as the parties had reached an understanding that all requested information had been satisfied, but a resolution was not forthcoming (Tr. 187–190).

The Respondent Violated Section 8(a)(5) and (1) of the Act when it Failed to Fully and Timely Provide the Relevant Information Requested

It is a violation of 8(a)(5) and (1) of the Act when an employer fails or refuses to provide information requested for contract negotiations. *NLRB v. Truitt Mfg., Co.,* 351 U.S. 149 (1956). This obligation extends beyond contract negotiations and applies to administration of the contract, including grievance processing. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967); *Ormet Aluminum Mill Products, Corp.,* 335 NLRB 788, 790 (2001); *Postal Service*, 332 NLRB 635 (2000); *Beth Abraham Health Services*, 332 NLRB 1234 (2000). In order for the obligation to furnish information to attach there must be a request made and the information requested must be relevant to the union's collective-bargaining need. *Saginaw Control & Engineering, Inc*., 339 NLRB 541 (2003).

The Board has held that information concerning bargaining unit employees is presumptively relevant and is required to be produced. *Contract Flooring Systems*, *Inc.*, 344 NLRB 925, 928 (2005). Relevancy should be broadly construed and absent any countervailing interest, any requested information that has a bearing on the representative process must be disclosed. The burden to show relevancy is not exceptionally heavy, "requiring only that a showing be made of a probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NLRB v. Acme Industrial Co*., 385 U.S. 432, 437 (1967). The standard for relevancy is the same, whether relevancy is presumed or proved by specific evidence. The standard to apply is a liberal discovery-type standard. *Acme Industrial Co.,* supra at 437.

Where the information sought concerns the filing or processing of grievances, the requesting union is entitled to the information in order to determine whether it should exercise its representative function in the pending grievances, or whether the information will warrant further processing of the grievance or bargaining about the matters involved with the grievance. *Ohio Power Co.*, 216 NLRB 987 (1975), enfd. 531 F.2d 1381(6th Cir. 1976). Accordingly, a union is entitled to relevant information during the term of a collective-bargaining agreement to evaluate or process grievances and to take whatever other bona fide actions are necessary to administer the collective-bargaining agreement. *Reno Sparks Citilift*, 326 NLRB 1432 (1998).

In the instant case there is no contention that the information sought was not relevant. The request by the Union was specifically tailored and limited to the information needed in the Union's role as the exclusive bargaining representative for Colón in the grievance procedure. A close review of the request pertained only for information as to the factual basis for Respondent's determination that Colón's conduct was considered "hostile." The Union wanted to know 1) what was the conduct; 2) when did it take place; 3) who was the conduct directed towards; and 4) whether there were any witnesses to the conduct. The request also sought information as to the telephone and radio calls that Colón allegedly failed to answer and who and when the calls were made. Indeed, the presumptive relevancy of the information was made clear when all the information was provided by the Respondent on December 14, 2015.

Further, an unreasonable delay in furnishing relevant information is also a violation of Section 8(a)(5) and (1). The Board summarized the standard that it employs in assessing a claim of unreasonable delay

> In determining whether an employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident. Indeed, it is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow. In evaluating the promptness of the response, the Board will consider the complexity and extent of

information sought, its availability and the difficulty in retrieving the information. [Internal quotation marks and citations omitted.] *West Penn Power Co.,* 339 NLRB 585, 587 (2003), enfd. in pertinent part 394 F.3d 233 (4th Cir. 2005).

A response provided by Santiago on January 30 merely stated that Colón acted in a disrespectful and hostile manner on November 22, in challenging the instructions given by dispatcher Ramos. The response further stated that it was a common practice for Colón not to answer the telephone or radio in a timely manner when called by the dispatchers (Jt. Exh. 6). The Respondent provided a second response on May 15 and reiterated that Colón engaged in hostile conduct towards dispatcher Ramos on November 22 and Colón got upset and responded in an aggravated challenging attitude when ordered by Ramos to stay at the port. The May 15 response also gave times and dates when Colón did not answer the radio or telephone extending back to March 2011 (Jt. Exh. 7).

The Union stated on June 5 that the Respondent's response as to what constituted Colon's hostile conduct was conclusive statements and it never described what was the aggression or hostility conduct engaged by Colón. The Union also maintained that the Respondent never provided the information of the telephone and radio calls for November 22 that was the subject of the warning letter and because the Respondent opened the door to Colón prior failure to respond to such calls, the Union was now requesting information on the prior alleged failures to answer the calls from the dispatchers (Jt. Exh. 8).

In this instant complaint, the information request was made on January 22, 2015. The information requested was not fully complied with until the day of the hearing on December 14, almost 11 months from the initial request. In *Regency Service Carts, Inc.,* 345 NLRB 671, 674 (2005), the Board found a 16-week delay in furnishing information unreasonable. The Board has found delays of 14 weeks, *Pan American Grain*, *Co., Inc.*, 343 NLRB 318 (2004), 6 weeks, *Bundy Corp*., 292 NLRB 671 (1989), 7 weeks, *Woodland Clinic*, 331 NLRB 735, 737 (2000), 6 weeks, *Bituminous Roadways of Colorado*, 314 NLRB 1010 (1994), 5 weeks, *Postal Service*, 332 NLRB 635 (2000), 3 weeks, *Aeolian Corp.*, 247 NLRB 1231 (1980), 20 days, *Butcher Boy Refrigerator Door Co.*, 127 NLRB 1360 (1960), 2 weeks in *Capitol Steel & Iron Co*., 317 NLRB 809 (1995), as being unreasonable.

In *Capitol Steel & Iron Co.*, above, the Board concluded a 2 week delay was unreasonable where the information requested was simple, the information was close at hand, the respondent was able to put together the information together in a short time period and during those 2 weeks, a strike had begun which the Board concluded warranted extra effort by respondent. In *Postal Service*, 354 NLRB 412 (2009), a 30 day was an unreasonable delay in providing the requested information in a grievance proceeding.

Here, the request was simple and not unduly burdensome. The Union initially requested information only pertaining to the November 22 incident. The Respondent nevertheless was responsible for opening the door with prior allegations against Colón that required the Union to request additional information. Santiago was not new in his position. He is an experienced manager for many years and has been acting as the vice-president of the company since 2013. Santiago has also interacted with the Union on numerous past occasions. As such, his failure to respond promptly cannot be due to a lack of experience. Also, given that the information request was made in the context of a pending grievance, time was of the essence.

Accordingly, I find that 11 months was an unreasonable delay in providing the requested information. By failing to timely provide the requested information, Respondent violated Section 8(a)(5) and (1) of the Act.[14]

CONCLUSIONS OF LAW

1. At all material times, the Respondent, McAllister Towing and Transportation Co., Inc., Puerto Rico Branch, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Organization of Masters, Mates & Pilots, International Longshoremen's Association, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(3) and (1) of the Act by disciplining José M. Colón with a written warning and reducing the points on his 2014 performance evaluation because he engaged in protected concerted and union activity.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish relevant and necessary information for the fair representation of José Colón in the grievance process.

5. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent having discriminatorily issued a written warning and reduction in points to José Colón, must expunge from its files any and all references to the unlawful discipline and to restore the original evaluation scores in his 2014 performance evaluation of the aforementioned employee and to notify him in writing that this has been done and that the unlawful written warning will not be used against him in any way.

Further, by failing and refusing to fully provide the relevant information to the Union in its January 22, 2015 request, Respondent has committed an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act. By delaying to promptly provide the relevant information to the Union in its January 22, 2015 request, Respondent has committed an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

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[14] The fact that the Union may not have reminded the Respondent about the information requests is inconsequential. *International Protective Service*, *Inc.*, 339 NLRB 701, 704 (2003). The only issue is whether the Union is entitled to the information at the time it makes the request and unless the employer has a valid defense, the employment must promptly provide the information. *Woodland Clinic*, 331 NLRB 735, 737 (2000).

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted

Continued

ORDER

The Respondent, McAllister Towing and Transportation Co., Inc., Puerto Rico Branch, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining or otherwise discriminating against any employee for engaging in protected concerted and union activity.

(b) Failing, refusing and delaying to provide to the Union, International Organization of Masters, Mates & Pilots, International Longshoremen's Association, AFL–CIO, information requested that is necessary and relevant to its role as the exclusive representative of a unit of employees consisting of all licensed personnel employed on all vessels owned, operated, or chartered by Respondent and its subsidiaries, in Puerto Rico operations, excluding all other employees, guards, and supervisors.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discipline of José Colón and restore the four points for "Ethics" in his 2014 performance evaluation, and within 3 days thereafter notify him in writing that this has been done and that the discipline will not be used against him in any way.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(c) Within 14 days after service by the Region, post at its existing facilities in the Puerto Rico area copies of the attached notice marked "Appendix"[16] in the English and Spanish languages. Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the jobsites involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 22, 2014.

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by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 25, 2016

Kenneth W. Chu
Administrative Law Judge

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefits and protection
Choose not to engage in any of these protected activities

The International Organization of Masters, Mates & Pilots, International Longshoremen's Association, AFL–CIO (the Union) is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All licensed personnel employed on all vessels owned, operated, or chartered by Respondent and its subsidiaries, in Puerto Rico operations, excluding all other employees, guards and supervisors.

WE WILL NOT adversely affect your performance evaluation, discipline, discharge or otherwise discriminate against you because you engage in protected concerted activities or to discourage you from engaging in these or other concerted and union activities.

WE WILL NOT refuse or delay in promptly furnishing the information requested by the Union that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of the employees in the above unit.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of the recommended Order, remove from our files any reference to the unlawful written warning dated December 9, 2014, of José M. Colón and expunge it from our records, and within 3 days thereafter, WE WILL notify him in writing that we have done so and that the discipline will not be used against him in any way.

WE WILL restore the total scores that José M. Colón received for his 2014 performance evaluation before his score was reduced for the "Professional Ethics" portion of his evaluation and within 3 days thereafter, we will notify him in writing that we have done so and that the discipline will not be used against him in any way.

WE HAVEprovided the Union with the information it requested on January 22, 2015.

McALLISTER TOWING and TRANSPORTATION CO., INC., PUERTO RICO BRANCH

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

South Trust Plaza, 201 East Kennedy Boulevard, Ste 530,
Tampa, FL 33602-5824
(813) 228-2641, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-146711 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228-2455